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**FILED**  
YOLO SUPERIOR COURT

OCT 16 2009  
By B. J. [Signature]  
Deputy

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF YOLO**

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

vs.

MARCO ANTONIO TOPETE,  
Defendant.

Case No.: 08-3355

DEFENDANT'S REPLY TO PEOPLE'S  
OPPOSITION TO MOTION TO SET ASIDE  
CIRCUMSTANCE C OF COUNT 1 AND  
COUNT 5 OF THE INDICTMENT [Penal  
Code § 995]

Date: November 6, 2009  
Time: 8:30 a.m.  
Dept: 9

**INTRODUCTION**

The prosecution makes much of the fact that the statutes charged are California Penal Code sections 190, subdivision (a)(22), and 186.22, subdivision (a), rather than section 186.22, subdivision (b)(1),<sup>1</sup> which is the statute charged in many of the cases cited by the defense. This is a distinction without a difference, as evidenced by the lack of citations to any case law in support of their evaluation of the differences between the evidence required to prove up the gang issue implicated by those statutes. Finally, no reference is made by the prosecution to any evidence

<sup>1</sup> All further references are to the California Penal Code, unless otherwise noted.

submitted to the Grand Jury that indicates the alleged murder of Deputy Sheriff Diaz furthered the activities of a street gang, much less that they committed with the intent to further the activities of a street gang.

## **LAW AND ARGUMENT**

### **I.**

#### **THE STATUTORY LANGUAGE AND CALCRIM INSTRUCTIONS FOR SECTIONS 190(a) (22), 186.22(b) (1), AND 186.22(a) ALL REQUIRE SOME EVIDENCE THAT THE CRIME WAS COMMITTED FOR THE BENEFIT OF A GANG**

##### **A. The Prosecution Does Not Cite to Any Authorities to Support Its Argument**

The prosecution relies heavily on the differences in language between section 190, subdivision (a)(22), section 186.22, subdivision (b)(1), and section 186.22(a), to distinguish between this case and those cited by the defense. However, they do not cite to any cases or authority, persuasive or otherwise, to support their position. Failure to provide references to the record and authorities to support argument render the argument by a party waived.

As the California Supreme Court stated in no uncertain terms in a number of cases, “every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. (9 Witkin, Cal. Procedure, (3d ed. 1985) Appeal, §479, p. 469; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15; *Duncan v. Ramish* (1904) 142 Cal. 686, 689-690.)” (*People v. Stanley* (1995) 10 Cal.4<sup>th</sup> 764, 793.)

The prosecution’s argument ought to be deemed waived insofar as they cite to no legal authority to support their argument.

##### **B. The Statutes are Identical with Regard to the Relevant Element of Intent**

All three statutes require a showing that a crime, a murder in the case of section 190, subdivision (a) (22), was committed with the intent to further, i.e. benefit, a gang. Unlike section 186.22, subdivision (b)(1), both section 190, subdivision (a) (22), and section 186, subdivision (a), also require a showing that the defendant was a member of a gang at the time the crime was committed. Regardless, the issue in this motion relates to the content of the allegation of “intent

1 to further” and what constitutes some evidence of that intent. The parallels between these statutes  
2 are useful for analyzing that issue.

3 Section 190.2, subdivision (a) (22), requires proof that the “defendant intentionally killed  
4 the victim while the defendant was an active participant in a criminal street gang...” “**and the**  
5 **murder was carried out to further the activities of the criminal street gang.**” (emphasis  
6 added.) CalCrim 736 does little to elucidate what is meant by “carried out to further” insofar as  
7 element number 4 merely repeats the phrase as it appears in the statute.

8 Section 186.22, subdivision (a), requires proof that the defendant “actively participates in  
9 any criminal street gang with knowledge that its members engage in or have engaged in a pattern  
10 of criminal gang activity,”... and “**willfully promotes, furthers, or assists in any felonious**  
11 **criminal conduct by members of that gang.**” (emphasis added.) CalCrim 1400 is again silent  
12 on the issue of what constitutes proof of “willfully” promoting, furthering or assisting. Similarly,  
13 element number 3 merely restates that the prosecution must prove “[t] he defendant willfully  
14 assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: a.  
15 directly and actively committing a felony offense; OR, b. aiding and abetting a felony offense.”

16 To further complicate matters, the gravamen of the case law regarding these statutes  
17 concentrates on the usually more difficult issue of analyzing what is required to prove  
18 participation in a street gang or knowledge of its activities. Any intelligible attention regarding  
19 the intent to further the activities of a gang is provided in case law by analysis of the language in  
20 section 186.22, subdivision (b)(1).

21 That section requires proof that the defendant was “convicted of a felony **committed for**  
22 **the benefit of, at the direction of, or in association with any criminal street gang,** with the  
23 **specific intent to promote, further, or assist in any criminal conduct by gang members.**”  
24 (emphasis added.) CalCrim 1401 is helpful insofar as it provides proper emphasis on the element  
25 of intent. The prosecution must prove “1. The defendant committed the crime for the benefit of,  
26 at the direction of, or in association with a criminal street gang; 2. The defendant intended to  
27 assist, further, or promote criminal conduct by gang members.” (*Ibid.*)

28 Clearly, the requirement of proof of intent to further criminal conduct by gang members  
is identical in all three of the statutes. The prosecution makes no argument to indicate any

1 substantive difference between the statutes with regard to the issue of intent to further the  
2 activities of the gang.

3 **C. The Only Difference Between the Statutes are Irrelevant as to the Element of Intent**  
4 **to Further the Activities of a Gang**

5 Any differences between the statutes relate to elements that are not relevant to this  
6 motion. None of those other elements relate to intent to further or assist in the criminal activity of  
7 the crime. Moreover, section 190.2, subdivision (a) (22), and section 186.22, subdivision (a),  
8 require proof of additional elements, and therefore would require additional evidence. The  
9 prosecution's reliance on these differences is misplaced insofar as the differences relate to  
10 elements irrelevant to the issue central to this motion; i.e. *intent* to further the activities of a street  
11 gang.

12 For example, section 190, subdivision (a) (22), requires the prosecution to prove that the  
13 defendant committed a murder. Section 186, subdivision (b) (1), only requires proof that the  
14 defendant committed a felony. Certainly, it is indisputable that there are elements of proof in  
15 murder that are absent in other felonies. See e.g. *People v. Sanchez* (2001) 24 Cal.4<sup>th</sup> 983, 988;  
16 *People v. Benjamin* (1975) 52 Cal. App. 3d 63, 71; *In re David S.* (1983) 148 Cal. App. 3d 156,  
17 158.

18 Additionally, section 190, subdivision (a) (22), requires the prosecution to prove that the  
19 defendant committed the murder while an active participant in a street gang. This requires proof  
20 of membership at the time of the offense as well as proving that the organization to which the  
21 defendant belonged was a street gang as defined by section 186.22, subdivision (f). While  
22 section 186.22, subdivision (b) (1), also requires proof that the related organization was a street  
23 gang, there is no requirement of proof of membership. Proving the defendant was a member of a  
24 street gang requires more than merely establishing an organization as a street gang. See e.g.  
25 *People v. Robles* (2000) 23 Cal. 4<sup>th</sup> 1106, 1108; *People v. Lamas* (2007) 42 Cal.4<sup>th</sup> 516, 525.

26 Plainly, although there are differences between section 190, subdivision (a)(22), and  
27 section 186.22, subdivision (b) (1), they do not relate to the element of intent to further gang  
28 activities. The meaningful differences would require proof of additional elements, more rather

1 than less evidence, and therefore do not provide a basis to distinguish the cases relied on by the  
2 defense it its motion.

3 Similarly, section 186.22, subdivision (a), requires the prosecution the prove elements not  
4 present in subdivision (b) (1). The former requires proof that the defendant is an active  
5 participant in a street gang and that the defendant has knowledge of the criminal activities of the  
6 street gang. Subdivision (b) (1) is a simple aggravator which “increases the punishment for gang  
7 related felonies” whereas subdivision (a) “defines a particular offense to which only gang  
8 members are subject.” *People v. Robles, supra*, 23 Cal. 4<sup>th</sup> at 1108. Like section 190,  
9 subdivision (a)(22), section 186.22, subdivision (a), requires proof of membership in a street  
10 gang at the time of the offense, whereas section 186.22, subdivision (b)(1), does not.  
11 Additionally, subdivision (a) requires proof that the defendant had subjective knowledge of the  
12 street gang’s criminal activities, rather than mere objective proof of membership in an  
13 organization that is a street gang. *People v. Lamas, supra*, 42 Cal.4<sup>th</sup> at 525. Again, this would  
14 require more, rather than less, evidence.

15 The issue in this motion is the evidence required to prove intent to benefit a gang. In that  
16 regard, the statutes are the same. “It is an established rule of statutory construction that similar  
17 statutes should be construed in light of one another [citations], and that when statutes are *in pari*  
18 *materia* similar phrases appearing in each should be given like meanings.” (*People v. Caudillo*  
19 (1978) 21 Cal.3d 562, 585, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th  
20 225, 229, 237, fn. 6.) Any differences between the statutes do not relate to the issue of intent.  
21 Therefore, the analysis in the authorities relied on by the defense is directly on point to the issue  
22 of *intent*. In fact, the differences between the statutes only arises where the charged statutes  
23 require proof of additional elements not required by section 186.22, subdivision (b) (1).  
24 Therefore, any argument as to the inapplicability of the referenced case law in the defendant’s  
25 motion is a “distinction without a difference as far as the present issue is concerned.” *Huynh v.*  
26 *Superior Court* (1996) 45 Cal.App.4<sup>th</sup> 891, 895.

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II.

**CASE LAW CLEARLY INDICATES THAT A SUPPOSED EXPERT'S OPINION  
AS TO THE BENEFIT THE CRIME MAY HAVE TO A GANG IS NOT SOME  
EVIDENCE THAT A CRIME WAS COMMITTED WITH THE INTENT TO  
FURTHER THE ACTIVITIES OF THE GANG**

All testimony presented to the grand jury concerning how the alleged shooting furthered the activities of a gang was provided solely by Detective Cordova, who testified as a gang expert. Any reference by other witnesses to gang issues related solely to gang membership. Indeed the bulk of Detective Cordova's testimony related to the issue of whether the Norteños are a street gang and whether the defendant was a member. (See Statement of Facts, Defense Motion.) None of the testimony or other evidence presented to the Grand Jury provided any basis to conclude that the murder of Deputy Diaz was committed *with intent to further* the activities or criminal conduct of a street gang. The prosecution has not presented any substantive argument to the contrary.

Instead, the prosecution attempts to distinguish this case from those cited by the defense based upon the nature of the charged crime. It appears that their argument is that where the charged crime is the primary activity of the gang, then the expert testimony provides evidence of intent. Aside from failing to cite to any authority to support their argument, as discussed above, it is a red herring argument insofar as any evidence relating to the primary activity of the alleged street crime relates to the element of whether an organization is a street gang, not the element of intent to further activities of that organization. (See §186.22, subdivision (f).) Attempting to distinguish between the activity of carrying a weapon and aggravated assault is irrelevant to the issue of whether a defendant *intended* an alleged crime to further the activities of a gang. Such facts do nothing to provide evidence of intent in this case.

Regardless, testimony that one of the central activities of the street gang is felony assault is not evidence of the defendant's subjective *intent* as to the commission of a specific crime. Additionally, felony assault describes a very broad category of criminal conduct. Mere commission of a felony assault without any reference to the facts of the offense cannot, in and of itself, provide evidence of intent. (See e.g. *People v. Albarran* (2007) 149 Cal.App.4<sup>th</sup> 214

1 [finding that shooting at a house did not provide a sufficient factual basis for intent to further the  
2 activities of a street gang].) Similarly, felony assault as a general category is significantly  
3 different from the specific act murder, and the mere fact that an offense may fall into that broad  
4 category glaringly lacks any specificity which might indicate what the actor's subjective intent  
5 was at the time of committing the offense.

6 As thoroughly argued in the defense's motion, there are no indicia from any other  
7 evidence presented to the Grand Jury that the murder of Deputy Diaz was in any way related to  
8 a gang. More significantly, no evidence whatsoever was presented to the Grand Jury that the  
9 murder of Deputy Diaz was intended by the perpetrator to "further the activities of the criminal  
10 street gang" or that the perpetrator "willfully assisted, furthered, or promoted felonious criminal  
11 conduct by members of the gang" as required by section 190.2, subdivision (a) (22), and section  
12 186.22, subdivision (a).

### 13 III.

#### 14 **EVIDENCE THAT AN EARLIER INCIDENT OCCURRED NEAR THE HOME** 15 **OF A GANG MEMBER DOES NOT PROVIDE EVIDENCE THAT THE** 16 **MURDER OF DEPUTY DIAZ WAS COMMITTED WITH THE INTENT TO** **BEFEBIT A GANG**

17 The prosecution again conflates the issues by relying on the earlier shooting that occurred  
18 on Sunrise in their opposition. Although it may be helpful for the purposes of providing evidence  
19 of membership in a gang, for establishing a timeline, or for identification purposes; the color of  
20 the defendant's clothing and the fact that he may have been present at an identified gang  
21 member's home does nothing to provide evidence that the later shooting was committed to  
22 further the activities of a gang. The prosecution seems to be missing the point of defense's  
23 motion, which may account for their failure to address the central point in their opposition or to  
24 present adequate proof before a Grand Jury. The issue is *intent* for the murder of Deputy Diaz to  
25 further the activities of a street gang, not gang membership.

26 Guilt is personal. A member cannot be held liable unless he or she acts with knowledge  
27 and specific intent to further illegal activities. (*Scales v. United States* (1961) 367 U.S. 203, 225.)  
28 Membership in an organization does not lead to any inference as to the conduct of a member on  
any given occasion. (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.) The language of the relevant

1 statutes clearly reflects these principles by isolating the element of *intent* to further the activities  
2 of a street gang from both membership in and knowledge of a street gang. The prosecution has  
3 failed to provide contrary authority or articulate a meaningful interpretation of these statutes  
4 which would permit the Court to conflate these elements. The law is clear: Evidence of  
5 membership in a gang is not proof of the subjective *intent* to commit a particular crime in order  
6 to further the activities of a street gang.

7 **CONCLUSION**


8 Based upon the foregoing, and the points and authorities submitted in the defendant's  
9 opening brief, it is urged that the Court grant the motion to set aside circumstance C of count 1  
10 and count 5 of the Indictment.

11  
12 Dated: October 14, 2009

13 Respectfully submitted,

14 HAYES H. GABLE III  
15 THOMAS A. PURTELL

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18 By:

  
19 HAYES H. GABLE III  
20 Attorney for the Defendant  
21 MARCO ANTONIO TOPETE  
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 428 J Street, Suite 350, Sacramento, CA 95814.

On the date below, I served the following document(s):

**DEFENDANT'S REPLY TO PEOPLE'S OPPOSITION TO MOTION TO SET ASIDE CIRCUMSTANCE C OF COUNT 1 AND COUNT 5 OF THE INDICTMENT [Penal Code § 995]**

☒ BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

☐ BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

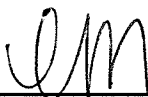
JEFF REISIG  
GARRET HAMILTON  
Yolo County District Attorney  
301 Second Street  
Woodland, CA 95695

☐ BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

☐ BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2009, at Sacramento, California.

  
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Declarant